Supreme Court, U.S.
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No. 09- 09-909

IN THE
Supreme Court of the United States

KEVIN DAVIS, Surviving Spouse of Decedent, Donise Davis, Individually and as Court-Appointed Administrator of the Succession of Donise Davis and the Succession of Donise Davis; LESLIE MICHELLE LASENBURG, Widow of Kevin Davis and also as court-appointed Administratrix of the Succession of Kevin Michael Davis; MARY BETH BROWN, surviving mother of Donise Davis, and as court-appointed Administratrix of the Succession of Donise Davis; KEITH DAVIS,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Does the discretionary function exception to the Federal Tort Claims Act, 28 U.S.C. § 2671, *et seq.* waiver of sovereign immunity provide immunity to negligent acts of a government agent acting outside the scope of mandatory directives?

II. Does the discretionary function exception to the Federal Tort Claims Act, 28 U.S.C. § 2671, *et seq.* waiver of sovereign immunity provide immunity to the negligent acts of a government agent at the operational level with no authority to determine policy, priorities, or the allocation of resources?

III. Are the immunity provisions in the Stafford Act, 42 U.S.C. § 5121, *et seq.*, to be interpreted in the same manner as this Court has interpreted the Federal Tort Claims Act, 28 U.S.C. § 2671, *et seq.*?

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OPINIONS BELOW

The opinion and judgment of the Fifth Circuit Court of Appeals is reported at 2009 WL 3489854 attached as Appendix A. The District Court's judgment and order is attached as Appendix B.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit upholding the District Court Judgment was entered on October 29, 2009. This Court has jurisdiction pursuant to 28 U.S.C. § 1254 (1). The basis for federal jurisdiction in the United States Court for the Eastern District of Louisiana was federal question jurisdiction. 28 U.S.C. § 1331. Jurisdiction in the Fifth Circuit Court of Appeals was based upon its appellate jurisdiction pursuant to 28 U.S.C. § 1291.

FEDERAL STATUTES INVOLVED

The following provisions of Federal law are at issue:

I. 42 U.S.C. § 5158

> The Federal Government shall not be liable for any claim based upon the exercise or performance of or the failure to exercise or perform a discretionary function or duty on the part of a Federal agency or an employee of the Federal government in carrying out the provisions of this chapter [42 U.S.C. § 5121, *et seq*].

II. 28 U.S.C. § 2680

> 28 U.S.C. § 2680 provides an exception to the waiver of immunity under the Federal Tort Claims Act as follows:
>
> Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the government, whether or not the discretion involved has been abused.

28 U.S.C. § 2680(a).

STATEMENT OF THE CASE

I. Introduction

Petitioners represent the estates of the named Plaintiffs in this matter. Respondent is the United States Government. This matter arose in the wake of the Hurricane Katrina tragedy. Donise Davis ("Decedent") was critically injured when she slipped out of a rescue strop which was being used to lift her into a United States Navy helicopter and fell between approximately forty to one hundred feet to the concrete roadway in view of her husband. The Navy helicopter departed, leaving Decedent lying on the concrete for approximately one hour before a United States Coast Guard helicopter arrived with the proper personnel and rescue equipment and transported

her to a hospital. Decedent was alive at the time the Coast Guard helicopter arrived, but expired shortly thereafter as a result of the injuries she received in the fall.

Decedent's husband filed a complaint under the Federal Tort Claims Act, 28 U.S.C. Section 2671 *et seq* ("FTCA"), and under the Louisiana Civil Code Articles for wrongful death, witnessing wrongful death of a spouse, and survivorship pursuant to LA. CIV. CODE art. 2315.1 (survival action); LA. CIV. CODE art. 2315.2 (wrongful death action); LA. CIV. CODE art. 2315.6 (liability for damages caused by injury to another); and LA. CIV. CODE art. 2316 (negligence, imprudence, or want of skill). The complaint alleged further damages pursuant to LA. CIV. CODE art. 2315 (liability for acts causing damages); LA. CIV. CODE art. 2317 (acts of others and of things in our custody); LA. CIV. CODE art. 2317.1 (damage caused by defect in things); LA. CIV. CODE art. 2320 (acts of servants); and LA. CIV. CODE art. 2324 (liability as solidary or joint and divisible obligation). The Complaint also specially pleads battery for injuring Decedent's body resulting in her death and allege that Respondent's crew violated Federal Aviation Regulation FAR 91.23, which prohibits careless and reckless operation of any civil or military aircraft causing injury to another. The Complaint further alleges that the Department of the Navy helicopter crew and Respondent violated its own standards as described in OPNAVINST 3710.7T Section 8.3, *et seq.* regarding performance and qualifications for its crew.

Shortly after filing the Complaint, Decedent's husband passed away and her interests are now

represented in this action by his estate through his subsequent wife. Respondent filed a motion for summary judgment pursuant to Rule 56(b) of the Federal Rules of Civil Procedure alleging that there was no genuine issue of material fact as to the issue of immunity and it was entitled to judgment as a matter of law. The District Court granted Respondent's motion and the Fifth Circuit Court of Appeals affirmed at 2009 WL 3489854.

II. Statement of Facts

On or about September 2, 2005, Decedent and her husband escaped Hurricane Katrina's floodwaters to a raised expressway. Respondent's helicopters arrived and successfully airlifted three survivors by cable from the expressway. After picking up others, one of Respondent's operators lowered the cable, positioned the boom, and sent the cable and harness to Decedent. Respondent's rescue swimmer attached a "rescue strop" to Decedent and the crew began to raise her toward the helicopter. Decedent began to slip and was lowered back down to the expressway. The rescue swimmer adjusted the rescue strop and again the crew lifted Decedent to the helicopter door. Once up to the door, Respondent's crew were unable to pull Decedent into the door and Decedent fell approximately one hundred feet to the concrete below. Respondent's helicopter departed from this scene of horror and abandoned Decedent on the expressway without attempting to provide her with medical care. She remained on the hard concrete ground, breathing painfully and bleeding internally, for over an hour before a Coast Guard helicopter arrived with the necessary

equipment and evacuated her from the site. Decedent's husband sat and watched in disbelief as Decedent lay dying on the concrete. Decedent passed away shortly after arrival at the hospital.

Respondent's crew was not equipped to rescue Decedent. Respondent's crew was equipped only with a rescue strop which it was specifically directed not to use.[1] Respondent's crew did not have any communications equipment that its rescue swimmer could use to communicate with the crew in cases where problems arose during the lift. The "standard rescue strop" which Respondent's crew used was in attempting to rescue Decedent was not permitted by regulation for such rescue.[2] The regulations clearly state that the crew should have used the "quick strop," a device which contains a crotch section that the outmoded "standard rescue strop" does not contain.[3] To complicate matters, the rescue strop the crew had was not modified per

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1. Navy Search and Rescue Manual, NWP 3-50.1. The Navy Search and Rescue Manual contains detailed instructions regarding the minutiae of conducting search and rescue operations. A "strop" is a device which is used to hoist people during helicopter operations. There are various designs of strops which are used based on the type of mission and the personnel to operate and be hoisted.

2. NWP 3-50.1. The "standard rescue strop" is to be used only with military personnel trained in its use. The "quick strop" is the required device to be used for direct deployment or civilian rescue and is fitted with an additional piece which, according to irrefutable testimony, would have ensured that Decedent would not have fallen to her death.

3. NWP 3-50.1.

regulations to include an additional loop to provide the crew with a necessary means for which to pull the subject into the helicopter.[4] Respondent's crew was not provided a properly modified rescue strop. Without the strap, the crew was unable to pull Decedent into the helicopter. Such modification would have prevented Decedent's injury and death.

A multitude of factors demonstrate that Respondent's crew should not have attempted to rescue Decedent. Respondent's crew was not trained to undertake a rescue of a civilian such as Decedent. Respondent's crew was not properly equipped and failed to properly attach rescue apparatus to Decedent. The rescue strop is designed so that if it were properly attached, the person lifted would not be able to lift her arms high enough to fall out of the strop. Decedent was of an inordinately large size and exceeded both the capabilities of the rescue strop and the weight restrictions for making a safe lift.[5] Matters were further complicated by the fact that the required communication system between Respondent's helicopter and its rescue swimmer were not present.[6] Respondent's crew did not appropriately evaluate the situations presented by Decedent's stature and their capabilities and should not have undertaken this rescue attempt.

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4. NWP 3-50.1.

5. NWP 3-50.1. Respondents did not provide information regarding weight restrictions for the operation. However, the Naval Aviation Mishap Safety Investigation Report indicated that Decedent's weight exceeded safety limits.

6. NWP 3-50.1. There was significant testimony that the failure to have the required communications equipment precluded Decedent's safe rescue.

Respondent's crew responded to their duty to assist our citizens with heroic zeal and the most noble of intentions. However, Respondent's crew failed to abide by the rules and regulations which were designed to guide their conduct. The crew themselves testified that the attempted rescue of Decedent was undertaken in direct contravention of the rules and regulations that they had been issued, upon which they had been trained, and were required to follow. Respondent's crew had no discretion to undertake this rescue and was required, according to its directives, to refuse this mission. This crew, while most certainly acting with the best of intentions, failed to adhere to the precepts of their training and the regulations to which they were bound. These violations of mandatory naval regulations caused Decedent's death.

REASONS FOR GRANTING THE PETITION

May it please this Court:

Petitioners seek to place as much of the tragic circumstances of this matter as possible aside and focus on the fundamental legal issues which arise in this matter and merit this Court's immediate attention. The United States District Court for the Eastern District of Louisiana and the Fifth Circuit Court of Appeals departed significantly from this Court's pronouncements on the discretionary function exception to the FTCA. *See United States v. Gaubert*, 111 S. Ct. 1267, 1273-74 (1991). These decisions effectively create a new exception to the FTCA. The lower court has

effectively stated that there is absolute immunity to all acting under Federal control in case of an emergency.[7]

I. Background in Law

A. Supreme Court Federal Tort Claims Act Jurisprudence

The concept of "sovereign immunity" precludes a lawsuit against a governmental body. *Dep't of the Army v. Blue Fox, Inc.*, 119 S. Ct. 697, 690 (1999). This concept dates back to the English legal fiction that "the King can do no wrong" and therefore may not be a defendant in his own courts. *Nevada v. Hall*, 99 S. Ct. 410, 414-15 (1979). Congress and this Court have, throughout the years, moved toward limiting the applicability of the doctrine of sovereign immunity. *See Complete Auto Transit, Inc. v. Reis*, 101 S. Ct. 1836, 1851 (1986) (Burger & Rehnquist, JJ, dissenting). Congress enacted the FTCA in 1946 to allow a plaintiff to pursue a tort claim against the Federal Government in the same way that it would against a private party. *See United States v. Muniz*, 83 S. Ct. 1850, 1852-53 (1963). The statute specifically waives sovereign immunity for personal injury claims arising out of:

> the negligent or wrongful act or omission of any employee of the Government while acting within

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7. The Fifth Circuit analysis very specifically took into consideration the emergency situation which arose as a result of Hurricane Katrina and determined that the discretionary function was applicable down to the minutiae of the operational level. *Davis v. United States*, 2009 WL 3489854 at *3 (5th Cir. 2009).

> the scope of his [or her] office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b)(1) Congress enacted this waiver of sovereign immunity with full appreciation of the burdens that it may cause the Treasury. *Rayonier, Inc. v. United States*, 77 S. Ct. 374, 377 (1957). It determined that it was preferable for the public as a whole to incur the costs of the Government's negligent actions than it would be for an individual to bear the potentially ruinous burden alone. *Id.*

Congress has created several specific exceptions to this waiver of sovereign immunity. *See* 28 U.S.C. § 2680. The pertinent exception for purposes of this Petition, and the one relied upon by Respondents below, is contained in 28 U.S.C. § 2680(a):

> The provisions of this chapter and section 1346 (b) of this title shall not apply to—
>
> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or

> an employee of the government, whether or not the discretion involved has been abused.

Id. This exception protects the United States from liability arising out of a tort claim based upon the exercise or performance, or failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the government. *Berkovitz by Berkovitz v. United States*, 108 S. Ct. 1954, 1958 (1988). The exception was designed to shield legislative and executive actions from judicial intrusion upon "legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *Id.* at 1959 *quoting United States v. Varig Airlines*, 104 S. Ct. 2755, 2764-65 (1984).

The discretionary function exception is only applicable to acts which are discretionary in nature and involve an element of judgment or choice. *Gaubert*, 111 S. Ct. at 1273. The central focus of the inquiry as to the discretionary function's applicability is on the conduct involved and not the status of the actor. *Id.* This exception only protects conduct which is "based on considerations of public policy." *Id.* at 1274. The Court has given clear indication that the discretionary act must have an effect not only on the specific instance in question, but also on a broader policy level. *See Varig Airlines*, 104 S. Ct. at 2767-68. These decisions receiving immunity may influence policy, priorities, or the allocation of resources, but they must all, at some level, involve discretion which involves regulatory or economic considerations.

The discretionary function exception is not applicable if a "federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow," because "the employee has no rightful option but to adhere to the directive." *Berkovitz*, 108 S. Ct. at 1958-59. This Court has further noted that, even assuming the challenged conduct involves an element of judgment, it is necessary to determine whether or not that judgment involved the type of decision that the discretionary function was designed to protect. *Gaubert*, 111 S. Ct. at 1273. If a regulation mandates particular conduct, and the employee follows that course of conduct, the government will be protected because the action will be deemed in furtherance of the policies which led to the promulgation of the regulation. *Id.* at 1274. If the employee violates the mandatory regulation, there will be no shelter from liability because there is no room for choice and the action will be contrary to policy. *Id.*

Although the decision to perform an act may be discretionary, once that decision has been made, the act must be undertaken with due care. *Indian Towing Company v. United States*, 76 S. Ct. 122, 126-27 (1955). It is at this point that the Government owes the individual the same duty of due care that a party not acting under the color of law would owe the individual under the same circumstances. *Id.* at 127. Such action, or lack thereof, does not involve "a permissible exercise of policy judgment." *Id.* If the Government undertakes an activity, it owes a duty of care to ensure that the activity is conducted with the same level of care that a private individual or entity would be required to assume. *Rayonier*, 77 S. Ct. at 376.

The difficulty which arises through this test is determining at exactly what point discretion ceases to be "grounded in social, economic, and political policy." Justice Scalia addressed this issue in his concurring opinion in *Gaubert*. 111 S. Ct. at 1280-82 (Scalia J., concurring). He noted that, while the status of the individual exercising discretion is not the sole determining factor as to whether or not the exception is applicable, it is

> often *relevant* to the discretionary function inquiry, since the answer to that inquiry turns on *both* the subject matter *and* the office of the decisionmaker. In my view a choice is shielded from liability by the discretionary function exception if the choice is, under the particular circumstances, one that ought to be informed by considerations of social, economic, or political policy and is made by an officer whose official responsibilities include assessment of those considerations.

Id. at 1280 (emphasis in original).[8] The identity of the party involved in making the determination provides guidance as to whether or not "the subject matter of the decision is one that ought to be informed by policy considerations."

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8. Justice Scalia's illustration of this point in the context of the decision in *Dalehite v. United States*, 73 S. Ct. 956, 972-73 (1953) clearly demonstrates the quandary that the discretionary function exception presents. *Gaubert*, 111 S. Ct. at 1280 (Scalia J., concurring). The *Dalehite* Court found that the discretionary function exception was applicable to government decisions relating to the procurement, quantity, and location of an explosive fertilizer. 73 S. Ct. at 972-73. Justice Scalia argued that the negligence of a dock foreman, despite the fact that such foreman took into

(Cont'd)

Id. It therefore should be presumed that the higher one is on the policy making scale, the more strongly the presumption that discretionary function immunity as intended by Congress is applicable. *Id.*

The FTCA was not created in a vacuum and was the result of three decades of Congressional deliberations through which Congress carefully crafted numerous specific limitations and safeguards. *Indian Towing*, 76 S. Ct. at 126. This Court has carefully noted that Congress determined the broad and sweeping manner in which Congress waived the Government's immunity from tort liability. *Rayonier*, 77 S. Ct. at 377. This Court has also indicated that exceptions to the waiver of immunity are to be narrowly construed to conform to Congressional intent. *Id.* This Court has, in each instance in which it has considered these issues, carefully demonstrated the applicability of the discretionary function exception to the circumstances before it.[9]

(Cont'd)

consideration cost and safety, which are relevant policy considerations, would not be immune because these were not his decisions to make, whereas a similar decision made by the Secretary of Agriculture would receive immunity as these were decisions within his purview of his duties. *Gaubert*, 111 S. Ct. at 1280 (Scalia J., concurring). Justice Scalia's dockworker / Secretary of Agriculture paradigm is precisely analogous to the present instance and clearly demonstrates the necessity for this Court to provide guidance as to this issue.

9. *See Gaubert*, 111 S. Ct. at 1273 (holding that the day to day actions of regulators supervising a savings and loan association fall within the discretionary function exception); *Boyle v. United Tech. Corp.*, 108 S. Ct. 2510, 2518 (1988) (holding that the selection

(Cont'd)

B. The Stafford Act

The Stafford Act, also known as the Disaster Relief Act of 1974, was enacted to provide federal assistance to the States in time of disaster. *Diversified Carting, Inc. v. City of New York*, 423 F. Supp. 2d at 90 (S.D. N.Y. 2005) *citing* 42 U.S.C. § 5121, *et seq.* To the extent that the Stafford Act allows for a private right of action against the federal government, the United States retains its sovereign immunity with respect to any activities that are "based on the exercise or performance of or the failure to exercise or perform a discretionary function or duty on the part of a Federal agency or an employee of the Federal Government in carrying out the provisions of [the Act]." 42 U.S.C. § 5148. The Fifth Circuit has applied the same discretionary function

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of the appropriate design for a piece of military equipment falls within the discretionary function exception); *Berkovitz*, 108 S. Ct. at 1964 (holding that the failure to comply with a specific policy regarding testing of vaccine lots does not fall within the discretionary function exception); *Varig Airlines*, 104 S. Ct. at 2767 (holding that the Federal Aviation Administration's program of "spot checking" aircraft to ensure compliance with safety regulations was not subject to question under the discretionary function exception); *Indian Towing*, 76 S. Ct. at 126-27 (finding that the failure to maintain a lighthouse did not fall within the discretionary function exception); *Dalehite*, 73 S. Ct. at 972-73 (holding that the Government's decision as to where, and in what quantities, to store fertilizer was not subject to judicial second guessing). In *Rayonier*, this Court, without addressing the issue of the discretionary function exception, determined that the United States could be liable for negligence arising out of allowing a fire to be started on government property and failing to act with due care in putting the fires out. 77 S. Ct. at 377.

exception analysis for claims brought under the Stafford Act as it has for claims under the FTCA. *St. Tammany Parish, Ex. Rel. Davis v. Federal Emergence Management Agency*, 556 F.3d 307, 319 (5th Cir. 2009). Petitioner does not contest the applicability of the analysis in this matter and contests only its application to the present matter and those similarly situated.

II. The United States is not Immune for the Negligent Actions of its Agents who Failed to Perform their Duties According to Policy

The Fifth Circuit, while conceding that Petitioners identified mandatory language in the Navy Search and Rescue Manual, found that a statement in the preface regarding deviations solely determined that these directives were mandatory. *Davis*, 2009 WL 3489854 at *2. The preface states that "rescue environment may require deviation from procedures contained herein. Deviation from specified rescue procedures is authorized in emergency situations where safety justifies such situation." *Id.* The next page of the document, and still within the preface, provides guidance on how the Manual is required to be interpreted and clearly denotes what is and what is not mandatory.[10] There was extensive testimony from the crew as well as expert testimony which interpreted these regulations to be mandatory. The Fifth Circuit followed the same path as the trial court and focused on the emergency and not on the directive and not whether or not the conduct involved considerations through which the exception was designed to protect. *See Gaubert*, 111 S. Ct. at 1273.

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10. NWP 3-50.1.

The Fifth Circuit, shortly before hearing the present case, addressed the discretionary function exception as it applies to the Stafford Act in *Freeman v. United States*, 556 F.3d 326 (5th Cir. 2009), *cert. denied*, 130 S. Ct. 154 (2009). *Freeman* involved the negligent failure to perform duties prescribed by the Department of Homeland Security's National Response Plan. *Id.* at 336-37. The court found that the policy directives that the Federal Emergency Relief Agency promulgated and assigned to its operatives were not specific directives and those who were charged with their implementation were protected by the discretionary function exception. *Id.* at 338.

Petitioners do not seek to question the validity of the *Freeman* decision, but do dispute the applicability of the holding to the present instance. Petitioners presented the Fifth Circuit with not only mandatory directives, but an interpretation of these directives from those who were required to follow them.[11] Respondent's crew acted negligently when it attempted to rescue Decedent and the failure to follow protocol resulted in her death. In the present case, and in contrast to the circumstances involved in *Freeman*, there is no argument that any form of policy was being determined

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11. There was extensive deposition testimony regarding the mandatory nature of the directives contained in the Search and Rescue Manual. The testimony elicited from Respondent's crew indicated that these directives were to be followed to the letter. Updates to the Search and Rescue Manual were frequently circulated and given immediate effect. Each of the provisions of the Naval Search and Rescue Manual which Petitioner presented to the Eastern District of Louisiana and the Fifth Circuit was in effect at the time of the ill fated rescue attempt.

during the failed rescue attempt. The decision to rescue Donise Davis was not based upon the exercise of any "social, economic, and political policy" decision. The decision to attempt this rescue using equipment that was prohibited for use in such situation was not based upon the exercise of any "social, economic, and political policy decision." There can be no question that the manner of carrying out a rescue was not based upon any "social, economic, and political policy" decision within any meaning ascribed to it by this Court. *Gaubert*, 111 S. Ct. at 1273.

The Eastern District of Louisiana and the Fifth Circuit appeared to focus their attention on the "emergency" surrounding the attempted rescue as opposed to whether or not there was negligence in conducting the rescue or the mandatory nature of the crew's directives. *See Davis*, 2009 WL 3489854 at *2.[12] There is nothing in the Stafford Act which supports a different treatment to its retention of immunity under the discretionary function exception. *See* 42 U.S.C. § 5148. There is nothing in the Stafford Act discretionary function provision which suggests that a court should grant any form of additional deference when judging actions carried out under Stafford Act authority. *See id.* A court's determination regarding the applicability of the discretionary function exception should follow the *Berkovitz* discretionary function test in the context of the policy implications of its availability to the actor in question and the discretion and forgo the "surrounding circumstances" treatment given by the lower courts in this matter. 108 S. Ct. at 1958-59.

12. The District Court transcripts were replete with mention of the catastrophic circumstances surrounding Hurricane Katrina and the court's oral ruling demonstrated that this was paramount in its consideration of the issues.

The Fifth Circuit's holding returns FTCA jurisprudence to the point where it existed prior to *Indian Towing* and *Rayonier*. A finding of immunity in this instance indicates that there is a distinction between the functions of the government and that of private parties such that there cannot be immunity in the present case expressly overrules those holdings. In the present instance, the burden of the Government's negligent actions falls squarely on the shoulders of Decedent's family. This is clearly not what Congress intended when it made its determination to waive sovereign immunity. *Rayonier*, 77 S. Ct. at 377. This clearly does not comport with this Court's interpretation of the FTCA and the discretionary function exception.

III. This Case Presents an Opportunity for this Court to Expand Upon Its Federal Tort Claims Act Jurisprudence

It has been nearly two decades since this Court last addressed the issue of discretionary function immunity in its *Gaubert* opinion. The Government's presence in the daily lives of our citizens and guests has expanded and is likely to continue to grow in the future. This continuing expansion necessitates clarification regarding the limits of the Government's authority and to ensure that the FTCA operates as Congress intended.

The matter before this Court, while it involves several tragic circumstances, is not complex. Decedent was stranded upon a bridge. Respondent's crew attempted to rescue Decedent. Respondent's crew operated under a clear set of instructions and procedures that it had *no* discretion to stray from. Respondent's crew should not

have undertaken this operation. Respondent's crew should not have attempted to rescue Decedent without observing the regulations and procedures the Navy established for such rescue. Respondent's crew acted negligently and outside of the scope of their training and procedures. Such dereliction of procedure caused Decedent's Death.

It is time this Court answer the questions that the *Gaubert* decision left open. The straightforward facts underlying this case provide the Court with the opportunity to examine the discretionary function exception as it applies to the lowest operational level. While conducting a search and rescue operation is far more complex than operating an automobile, it is, much like the operation of an automobile, the subject of training, rules, and regulations. *See Gaubert*, 111 S. Ct. at 1280 (Scalia J., concurring). This case presents the Court with a clear set of facts for which to determine to what degree the status of an actor exercising "discretion" and the actor's proximity from an executive position making a determination affecting "social, economic, and political policy" affects an inquiry into the applicability of the discretionary function exception. This Court can establish a framework that can guide the courts and provide predictability for those in the Legislative and Executive branches of our Government.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED OCTOBER 29, 2009

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 08-31119

KEVIN DAVIS, Surviving Spouse of Decedent, Donise Davis, Individually and as Court-Appointed Administrator of the Succession of Donise Davis and the Succession of Donise Davis; LESLIE MICHELLE LASENBURG, Widow of Kevin Davis and also as court-appointed Administratrix of the Succession of Kevin Michael Davis; MARY BETH BROWN, surviving mother of Donise Davis, and as court-appointed Administratrix of the Succession of Donise Davis; KEITH DAVIS

Plaintiffs - Appellants

v.

UNITED STATES OF AMERICA,

Defendant - Appellee

Appeal from the United States District Court
for the Eastern District of Louisiana
USDC No. 2:07-cv-03040

Before BARKSDALE, SOUTHWICK, and HAYNES, Circuit Judges.

Appendix A

PER CURIAM:*

The family of a person tragically killed during a Hurricane Katrina rescue operation brought suit against the United States. The district court dismissed, finding no subject matter jurisdiction because of statutory limits on liability in such situations. We AFFIRM.

I. FACTS AND PROCEDURAL BACKGROUND

When Hurricane Katrina struck the coasts of Louisiana and Mississippi on August 29, 2005, the President declared that a major disaster existed. He authorized federal assistance in the recovery. Under that authorization, the U.S. Navy performed search and rescue missions for stranded survivors.

On September 2, 2005, Kevin Davis and Donise Davis were among those who escaped the floodwaters by climbing onto the elevated Claiborne Avenue Expressway in New Orleans. A Navy helicopter arrived to offer rescue. Its crew consisted of two pilots, a rescue swimmer, and a hoist operator. The helicopter hovered at forty feet above the expressway. The rescue swimmer — which was his duty description, but the rescue was being attempted on the roadway above the water — was lowered.

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* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

After descending, the rescuer placed a rescue strop around Ms. Davis. During the lift, the hoist operator noticed that Ms. Davis's arms had become free of the restraining straps, and she was sinking into the rescue strop. The hoist operator and the rescue swimmer attempted to lift Ms. Davis into the helicopter cabin. After a brief struggle, Ms. Davis lifted her arms straight up and fell approximately forty feet onto the expressway.

Because the crew had no rescue basket, the pilot radioed a nearby Coast Guard helicopter for assistance. The Navy helicopter left the scene to make way, and the Coast Guard helicopter arrived. Rescuers lifted Davis into their helicopter by rescue basket. She died as a result of the injuries suffered in her fall during the Navy's rescue attempt.

Ms. Davis's husband filed suit in district court against the United States under the Federal Tort Claims Act and the Louisiana Civil Code. He alleged various torts including wrongful death, negligence, and battery. The Government asserted as a defense the immunity provisions of the Robert T. Stafford Disaster Relief and Emergency Assistance Act and the Federal Tort Claims Act. *See* 42 U.S.C. § 5148; 28 U.S.C. § 2680(a).

The Government moved to dismiss the case for lack of subject matter jurisdiction or, in the alternative, for summary judgment. After oral argument, the district court granted the motion. In its findings, the district court concluded that the Government was immune from suit.

II. DISCUSSION

We review *de novo* a district court's dismissal for lack of subject matter jurisdiction. *St. Tammany Parish ex rel. Davis v. Fed. Emergency Mgmt. Agency*, 556 F.3d 307, 315 (5th Cir. 2009).

The party which asserts jurisdiction bears the burden of proof for a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1). *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001). A Rule 12(b)(1) motion should be granted only "if it appears certain that the plaintiff cannot prove a plausible set of facts that establish subject-matter jurisdiction." *Castro v. United States*, 560 F.3d 381, 386 (5th Cir. 2009). In ruling on such a motion, the court may consider any one of the following: (1) the complaint alone; (2) the complaint plus undisputed facts evidenced in the record; or (3) the complaint, undisputed facts, and the court's resolution of disputed facts. *Lane v. Halliburton*, 529 F.3d 548, 557 (5th Cir. 2008).

Due to sovereign immunity, the United States can only be sued with Congress's consent. *Block v. North Dakota ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 287, 103 S. Ct. 1811, 75 L. Ed. 2d 840 (1983). The Federal Tort Claims Act lowers the sovereign immunity barrier for certain tort suits for money damages. *In re Supreme Beef Processors, Inc.*, 468 F.3d 248, 252 (5th Cir. 2006). The Federal Tort Claims Act, though, contains a discretionary function exception that makes the United States not liable for the following:

> Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

28 U.S.C. § 2680(a).

Similarly, the Stafford Act precludes government liability "for any claim based upon the exercise or performance of or the failure to exercise or perform a discretionary function or duty on the part of a Federal agency." 42 U.S.C. § 5148. This court recently held that the meaning of "discretionary function or duty" is the same in the Stafford Act and in the Federal Tort Claims Act. *St. Tammany Parish*, 556 F.3d at 319; 42 U.S.C. § 5148; 28 U.S.C. § 2680(a).

A two-part test has been established for determining whether the discretionary function exception applies to government employee conduct. *United States v. Gaubert*, 499 U.S. 315, 111 S. Ct. 1267, 113 L. Ed. 2d 335 (1991). First, the conduct must involve "an element of judgment or choice." *Id.* at 322 (quoting *Berkovitz v. United States*, 486 U.S. 531, 536, 108 S. Ct. 1954, 100 L. Ed. 2d 531 (1988)). Second, the judgment or choice must be based on considerations of public policy, for that

is the kind of judgment the discretionary function exception was designed to shield. *Id.* at 322-23.

We examine the Government's conduct under the first *Gaubert* prong. The Davis family identifies some mandatory language in the Navy's Search and Rescue Manual. Importantly, though, the manual's preface provides that a "rescue environment may require deviation from procedures contained herein. Deviation from specified rescue procedures is authorized in emergency situations when safety justifies such a deviation." Hurricane Katrina presented the sort of emergency situation justifying a deviation from the manual's provisions. The acts of alleged negligence were discretionary decisions made by the rescuers.

We turn now to the second *Gaubert* prong. If a regulation allows employee discretion, the regulation creates a "strong presumption" that the discretionary act authorized by the regulation involves the same policy considerations that led to the creation of the regulation. *Gaubert*, 499 U.S. at 324. Decisions about "when, where, and how to allocate limited resources within the exigencies of an emergency" are the types of policy decisions protected by the discretionary function exception. *Freeman v. United States*, 556 F.3d 326, 340 (5th Cir. 2009).

In the emergency left in the wake of Hurricane Katrina, rescuers had to allocate their time and resources. The failed rescue of the decedent resulted from an on-the-spot balance of the rescue need with the

safety considerations of doing so with the equipment available. Safety, efficiency, timeliness, and allocations of resources were all necessary to consider, the very policy considerations under the *Gaubert* framework that made the acts discretionary.

III. CONCLUSION

The Davis family did not identify a mandatory duty breached by the U.S. Navy rescuers. Further, the rescuers' decisions were grounded in public policy considerations. Consequently, the discretionary function exceptions of the Stafford Act and the Federal Tort Claims Act apply.

The judgment of the district court is AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA DATED NOVEMBER 4, 2008

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CASE NO. 07-3040

SECTION N(5)

JUDGE ENGELHARDT

MAG. CHASEZ

KEVIN DAVIS, ET AL

v.

UNITED STATES OF AMERICA

ORDER

Before the Court are the following motions:

1) Defendant, the United States of America's, motion to dismiss certain claims for failure to state a claim (Rec. Doc. 40);

2) The United States' motion to dismiss for lack of subject-matter jurisdiction claims for battery, strict liability, and constitutional torts (Rec. Doc. 41);

3) Plaintiffs, Kevin Davis, et al's, motion for partial summary judgment denying any discretionary immunity for the United States government as per FRCP 56 and striking its pled immunity defenses in its pleadings (Rec. Doc. 55);

4) The United States' motion to dismiss for lack of subject-matter jurisdiction or alternatively motion for summary judgment (Rec. Doc. 65); and

5) The United States' motion for summary judgment on intervenor's claim. (Rec. Doc. 93).

Considering the pleadings submitted and oral arguments of the parties, and for the reasons stated by the Court at hearing on October 15, 2008:

IT IS ORDERED that the United States' motion to dismiss for lack of subject-matter jurisdiction or alternatively motion for summary judgment (Rec. Doc. 65) is hereby **GRANTED** and Plaintiffs' motion for partial summary judgment denying any discretionary immunity for the United States government as per FRCP 56 and striking its pled immunity defenses in its pleadings is hereby **DENIED**.

IT IS FURTHER ORDERED that the United States' motion to dismiss certain claims for failure to state a claim (Rec. Doc. 40), motion to dismiss for lack of subject-matter jurisdiction claims for battery, strict liability, and constitutional torts (Rec. Doc. 41), and motion for summary judgment on intervenor's claim (Rec. Doc. 93) are hereby **DISMISSED AS MOOT.**

IT IS FURTHER ORDERED that Plaintiffs' claims are **DISMISSED** for lack of subject-matter jurisdiction under the immunity provision of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. § 5148.

Final judgment will issue in a separate document under Fed. R. Civ. P. 58(a).

New Orleans, LA, this 4th day of November, 2008.

s/ Kurt D. Engelhardt
Judge Kurt D. Engelhardt
Eastern District of Louisiana